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Supreme Court, U.S.
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No. ~~OFFICE~~ OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOHN DOE,

Pro Se Petitioner

v.

THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN DOE

Dated: July 19, 2007

QUESTIONS FOR REVIEW

1. Whether the military departments are required to grant a service member's request to call as a witness for confrontation and cross-examination the doctor authoring the Government's adverse written report used at the disability hearing, which 10 U.S.C. § 1214 requires to be a "full and fair hearing," for which the Supreme Court has already defined due process requirements (adequate for the ascertainment of the truth) in *Townsend v. Sain*, as elaborated by *Goldberg v. Kelly* (when there are issues of witness credibility and veracity, written submissions are a wholly unsatisfactory basis for decision)?

2. Whether 10 U.S.C. § 633 provides a property interest under the due process clause of the Fifth Amendment by giving a regular Air Force lieutenant colonel an "expectation of continued employment" for 28 years of active-duty commissioned service?

3. Whether the Department of Justice's trial attorney and his supervisors violated the trial court's Rule 11 when (A) the complaint stated only one doctor's report was in the record and that two documents (a second doctor's statement and its addendum written by a third doctor) were never in the Air Force administrative record because the Air Force intentionally withheld them from the administrative record because they contained defects including intentional false statements; (B) the trial attorney observed that the administrative record the Air Force delivered to him was missing those two documents; (C) the trial attorney was then forced to insert only the one doctor's statement and omit those two other documents from his response's voluminous appendix while attempting to mislead the trial judge into thinking those two documents were in the administrative record; (D) Doe surprised the trial attorney with an exchange

of letters, in which the Air Force Freedom of Information Act Manager reported months earlier that those two documents were not in the administrative record; (E) the trail attorney obtained copies of those two documents from working copies kept by the first doctor and then presented those copies to the trail judge claiming falsely that those two documents were always in the administrative record; and (F) the trial attorney's supervisors continually ignored Doe's letters complaining of his misconduct?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

This case is under seal in both the trail court and court of appeals, but this petition is carefully worded so that it can be made public. Petitioner appeals (1) the unreported, nonprecedential two-sentence April 5, 2007 Judgment (at appendix pages 1 and 2 ("A1-A2")) of the United States Court of Appeals for the Federal Circuit ("Fed. Cir.") which Judgment affirmed the Judgment (A35) and Opinion (A4-A34) of the United States Court of Federal Claims ("CFC") which opinion is reported at *Doe v. United States,* 66 Fed.Cl. 165 (2005), denying petitioner's appeal of the unpublished decision of the Air Force Board for Correction of Military Records ("AFBCMR") and (2) the unreported February 15, 2005 one-sentence CFC Order (A3) of Judge Braden denying petitioner's motion for Rule 11 sanctions, which CFC Order the Fed. Cir refused (A36) petitioner's request for rehearing to issue an Order disposing of petitioner's appeal of that CFC Order.

JURISDICTION

Jurisdiction for this petition for writ of certiorari arises under 28 U.S.C. § 1254(1) to appeal the April 5, 2007 Fed. Cir. Judgment discussed above. The Fed. Cir. filed on May 1, 2007 its very brief unpublished, nonprecedential Order denying petitioner's request for rehearing and to issue a disposition of petitioner's appeal of Judge Braden's Order denying Rule 11 sanctions.

TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, AND RULES

FIFTH AMENDENT TO THE U.S. CONSTITUTION

"No person shall be ... deprived of life, liberty, or property, without due process of law; ...."

5 U.S.C. § 706

(See appendix at A38.)

10 U.S.C. § 633

"Except an officer of the navy or Marine Corps who is an officer designated for limited duty to whom section 5596(e) or 6383 of this title applies and except as provided under section 637(b) of this title, each officer of the Regular Army, Regular Air Force, or Regular Marine Corps who holds the regular grade of lieutenant colonel, and each officer of the Regular Navy who holds the regular grade of commander, who is not on a list of officers recommended for promotion to the regular grade of colonel or captain, respectively, shall, if not earlier retired, be retired on the first day of the month after the month in which he completes 28 years of active commissioned service."

10 U.S.C. § 1214

"No member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it."

28 U.S.C. § 1491(b)(4)

"(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5"

Paragraph 3.2 of Air Force Instruction ("AFI") 36-3212

"**3.2. Legal Basis for Formal Hearings.** The FPEB provides the full and fair hearing required by 10 U.S.C. 1214 for members recommended for a disability discharge or retirement."

AFI 36-3212 Definition of "Full and Fair Hearing"

"**Full and Fair Hearing-**A hearing held by a board, before which the Service member has the right to make a personal appearance with the assistance of counsel and to present evidence in his or her behalf."

Rule 11 of the Rules of the United States Court of Federal Claims ("RCFC")

(See appendix at A39-A40.)

STATEMENT OF THE CASE

This case arose in the CFC under 28 U.S.C. § 1491 jurisdiction when *pro se* petitioner ("Doe") requested review of the AFBCMR decision, which denied Doe's 10 U.S.C. § 1552 administrative claim to rescind the decision of the Air Force Formal Physical Evaluation Board ("FPEB") determining Doe was unfit due to medical disability. Jurisdiction for Doe's appeal to the Fed. Cir. arose under 28 U.S.C. § 1295(a)(3).

Per guidance from the Clerk of the Supreme Court on (1) how to treat this case under seal in the CFC and Fed. Cir. and (2) keep this petition a public document, *pro se* petitioner wrote this petition referring in general terms to documents and facts that are under seal and omitted those documents from the appendix. Only public documents are included in the appendix except those, such as Doe's published papers, which would reveal his identity.

This Court should be aware that Judge Braden's opinion (A4-A34) contains much misinformation, which she extracted from hearsay statements contained in the written report of a resident (training to become a psychiatrist), whom Doe was not allowed to cross-examine at his "full and fair hearing" to expose the misinformation he wrote. The judge and resident mention documents, many of which were never in the administrative or court records and which, if they even existed, were never seen by anyone involved in the disability adjudication. So, here is the real story from the record.

If faster-than-light ("FTL") particles were ever discovered in the laboratory, one could telegraph messages into his past and foresee the future. See, for example, F. A. E. Pirani, Phys. Rev. D 1, 3224 (1970); G. A. Benford et al., Phys. Rev. D 2, 263 (1970), and R. G. Newton, Science 167, 1569 (1970), copies of which are in the administrative record. Professor Newton, *supra*, wrote "If such particles exist, some basic assumptions of physics will have to be abandoned." He concluded that relativity theory and quantum mechanics (the twin pillars underlying all physics) would have to go by the board. The Causality Principle underlying relativity and quantum mechanics would be destroyed.

On page 94 of his May 1985 interview in *Omni*, Nobel-Prize-winning physicist Murray Gell-Mann (one of the many Nobel prize winners on the board of editors of the international physics journal that published Doe's scientific papers) stated, "The laws of the elementary particles and of the universe underlie all of science, including all of physics, astronomy, chemistry, geology, biology, psychology, and in a sense even social science." He added, "One can in principle reduce social science to individual psychology; reduce individual psychology to biology; reduce biology to chemistry; reduce chemistry to physics; and then reduce physics to elementary particle and cosmological physics." So, a discovery of FTL particles would upset the whole structure of the knowledge of man. But, as Professor Newton

concluded in his paper cited above, "The final answer, of course, rests with the experimentalist."

After graduating from West Point and while a university student waiting for guest lecturer Wigner (colleague of Einstein and one of the many Nobel Prize winners on the board of editors of the physics journal that would later publish Doe's scientific papers on the discovery Doe was about to make that same day), Doe walked into the physics library across the hall to examine the paper on the anti-proton experiment (O. Chamberlain, E. C. Segre et al., Phys. Rev. 100, 947 (1955)), which earned the 1959 Nobel Prize for Segre and Chamberlain. That paper's Figure 3 presented histograms of time-of-flight data for both the anti-proton nuclear particles and the accompanying pi mesons ("pions" or simply "mesons"). Doe's quick calculations in his head revealed those pions were traveling FTL. Millions of FTL pions were knocked loose 21 degrees in the forward direction when the high-energy particle accelerator slammed the 4.3-GeV-to-6.2-GeV protons against the one-inch cubed target. Later that night, Doe discovered miscalculations and other errors, which Doe believes Segre and Chamberlain intentionally made to conceal the FTL velocities.

After confronting Segre and Chamberlain and getting no reply, Nobel Prize winners on the board of editors decided to publish Doe's first paper on the FTL pions.

A few years later, that same journal published Doe's second paper exposing many more false statements Segre and Chamberlain had written. That paper also demonstrated one could build a Pirani device in the laboratory using the FTL pions to send messages backward in time to that device so that one could foresee an earthquake 26 minutes in the future.

Back in 1955, if Segre and Chamberlain had announced to the world that, in addition to producing anti-protons, their experiment also produced FTL mesons, their experiment would have been doubted, and they would never have won the Nobel Prize. They would have been persecuted and run

out of the scientific community. Had Segre and Chamberlain elected instead to challenge Einstein's prohibition against FTL particles and risked the wrath and condemnation of the scientific community, in a different era and in a different century, scientific establishments of the future would have denounced the critics and persecutors and heaped upon Segre and Chamberlain their eternal gratitude and the eternal fame that transcends the winning of the Nobel Prize. Segre and Chamberlain would have been credited with performing the experiment that completely changed our understanding of the laws of the universe and ushered in such revolutionary concepts as Superrelativity, anti-gravity, and traveling backward in time. They would have been ranked right up there with Galileo and Columbus. School kids centuries later would have celebrated their achievement and recounted their persecution and suffering.

Unlike Segre and Chamberlain, Doe could champion FTL mesons because Doe, who had no doctorate or masters degree, had no reputation to lose and no scientific career to be destroyed. When the editors asked Doe to write that second paper, Doe was just a junior officer attending Squadron Officer School by order of the Commander, 22d Combat Support Group ("CSG"). During his four-year tour of duty with 22d CSG, Doe, who is single with no dependents, was on orders as a member of a team the 22d CSG would first send into combat situations around the world until the rest of the CSG could join them on the battlefield. Doe was required to keep with him at all times a flight bag with his combat gear to grab and jump on a jet within an hour whenever the call came in the middle of the night (as it often did). Doe picked up many medals during those four years and shortly thereafter was selected by the promotion board in the top 10% of all majors and ordered to attend Air Command and Staff College ("ACSC") in residence. Resident ACSC graduates comprise the limited pool from which the Air Force selects its future generals.

On July 6, 2006, physicist Nikolay Alexeev, on behalf of Director Boris Sharkov, wrote Doe that a group of Russian physicists from his nuclear laboratory had read Doe's papers on FTL particles and time-travel device and would contact Doe about performing the FTL experiment at the State Science Center of the Russian Federation - Institute of Theoretical and Experimental Physics ("ITEP") in Moscow. Subsequently, physicist Vyacheslav Zhabitsky wrote appellant that he is contacting other Russian physicists about performing the experiment at the Joint Institute for Nuclear Research ("JINR") at Dubna (a suburb of Moscow), where Dr. Zhabitsky had previously been the Chief Scientific Secretary scheduling experiments there.

Immediately after confirming the existence of the FTL mesons, Doe intends to do a second experiment at JINR. Doe and the Russian physicists working with him will alter the 1955 experiment to determine the new equations replacing the current Lorentz equations, upon which relativity is based. By altering the settings on the magnets and reconfiguring the timing devices, the experiment's equipment will accept FTL mesons with different flight-path curvatures corresponding to different momenta centered around 1.19 GeV/c. By pairing up these differing momenta to the differing FTL particle velocities independently measured by time-of-flight instruments, Doe and the Russians can use regression analysis on the paired data (momentum/velocity) to determine the new equations (probably the Recami-Mignani equations) underlying this new physics, which some physicists call "Superrelativity."

Another reason for believing the 1955 experiment will produce FTL mesons is Doe's draft manuscript on the strong nuclear force which he intends to publish after the confirmation of the FTL mesons and that second experiment deducing the new equations. Yukawa won the Nobel Prize for his theory of the strong nuclear force whereby two nucleons can bind together by continuously exchanging one

or more pions within the observational limits of the Heisenberg Uncertainty Principle (H. Yukawa, Proc. Phys. Math. Japan 17, 48 (1935)). Since then, more sophisticated nuclear instrumentation has developed empirical data, which reveal that Yukawa's macroscopic model fails to explain many phenomena: (1) The range of the nuclear force extends beyond the limit of the equations for Yukawa's macroscopic model when they are revised to account for relativistic meson velocities. (2) Furthermore, for proton-neutron interactions, empirical data show the potential for the strong nuclear force cuts off precisely at 2.0 fenta-meters ("F"). (3) Yukawa's macroscopic model cannot explain why the strong nuclear force is adequately described by only the one- and two-pion exchange potentials for distances greater than approximately 0.7 F between the nucleons. (4) Yukawa's macroscopic model cannot explain why, below this distance of 0.7 F, the possibility for many-pion exchanges rapidly becomes much greater. (5) The equations for Yukawa's macroscopic model can't explain the odd shape of the potential's curve or the values of the potential throughout the range. (6) The equations for Yukawa's macroscopic model can't explain why the strong nuclear force changes from repulsion to attraction or (7) why this transition occurs below 0.7 F. After modifying the Yukawa macroscopic model by using the Recami-Mignani equations to account for FTL pion velocities and then allowing the revised Yukawa model to use pions traveling at all possible velocities slower than and faster than the speed of light, Doe's revised model explains all seven of these empirically observed discrepancies.

Doe's breakthrough in his new superrelativistic model for the strong nuclear force was to integrate the Recami-Mignani equations to get

$$\int dv/((v^2/c^2)-1)^{1/2} = \ln((v/c)-((v^2/c^2)-1)^{1/2})$$

After integrating over the appropriate range, Doe got E_{av}/E_0, the average total energy at v divided by the rest energy, as follows:

$$E_{av}/E_0 = \frac{0.88137359\ c - \ln\left((v/c)+((v^2/c^2)-1)^{1/2}\right)}{1.4142136 - (v/c)}$$

Plugging in the range of numbers, Doe matched exactly the empirically observed Lomon values displayed in their graph at E. Lomon et al., Phys. Rev. Letters 6, 635 (1961). Comparing those numbers (the Lomon empirical values to the numbers generated by Doe's new model) inspires Doe with 100% confidence that his experiment will produce a stream of FTL mesons.

Once Doe empirically determines the equations underlying Superrelativity, Doe can use his engineering skills to build a device to send messages backward in time and predict the future like the device Doe described in his second paper.

Shortly after Doe's second paper was published and covering a period of two decades, neighbors often reported to Doe that they had observed intruders masquerading as utility men searching through Doe's home, yet Doe could find nothing missing. Every time Doe would move to a new assignment, within a few weeks, he'd find a putty substance in the locks to his new home. For example, on October 20, 1987, when Doe was living in Redondo Beach, CA, Doe's neighbor greeted him after Doe parked his car in his garage. The neighbor told Doe a man dressed as a utility man had been rummaging around in Doe's apartment. When the intruder saw the neighbor, he came out and, in front of the neighbor, wrote on the door a note on a card (which is part of the administrative record) with GTE logo and left it on Doe's front door. When Doe asked the neighbor how the intruder got a key to Doe's home, the neighbor stated he didn't know. Doe telephoned GTE offices, which referred Doe to the telephone number (826-9611) to Mr. Gonzalez.

the real GTE utility man servicing that area that day. Mr. Gonzalez told Doe that no one from GTE had been to Doe's home that day. Nothing was missing that day or in any of the other break ins spanning two decades.

The resident smeared Doe with a 1988 incident. Segre was a founding father of a major national laboratory and close friend with its directors. The directors falsely claimed to the Air Force that Doe was mentally ill because he believed in FTL particles and time travel. The psychiatrist, who told Doe they had lied to and grossly misled the Air Force, cleared Doe. Later, investigators doing a background check, including that incident, also cleared Doe for upgrade of his security clearance to Top Secret.

Judge Braden repeated misleading information from the resident's report about a jealous woman's false allegation of sexual harassment against Doe. Judge Braden and the resident wrote about a Letter of Admonishment ("LOA") and a reprimand, but no such documents were ever part of Doe's military records or part of the administrative record or court record. Although a general initially wrote the LOA, he later tore it up so that it never got into Doe's military records. The resident did a smear job on Doe writing about a document he never saw.

Seeking acknowledgment for his contribution, Doe wrote President Clinton two friendly letters (which were never in the administrative or court records and which no one in the Air Force or judicial system has ever seen, yet feel free to describe with false statements and mischaracterizations). A member of the White House staff telephoned Doe's boss denying that the President had ever used ideas from Doe's Air War College ("AWC") paper and directing him to compel Doe to undergo psychiatric evaluation (leading to discharge from the Air Force) (A8).

On November 13, 1998, a Medical Evaluation Board ("MEB") in California ("first MEB") determined Doe should be retired for disability due to the diagnosis of delusional

disorder in the written Narrative Summary of an Air Force psychiatrist and its addendum (a written Narrative Summary by another Air Force psychiatrist) ("two documents"). Those two documents were filled with lies including those (a series of paragraphs) that two colonels together in the first psychiatrist's office had warned her were false (which she had totally fabricated). Despite that warning, she kept all those lies in her final report. After Doe wrote a lengthy letter complaining about the psychiatrist's misconduct, a third colonel (MEB President) and fourth colonel (Head of the MEB administrative staff) rescinded the first MEB determination and arranged for Doe to undergo a new "clean slate" psychiatric evaluation at Wilford Hall Medical Center ("WHMC") in Texas without the taint of the previous two psychiatric reports.

At WHMC a resident ("resident") (A10), training to become a psychiatrist, interviewed Doe for only one hour. The resident was new to the Air Force. Somehow, he got a hold of a copy of those two tainted documents. His report was filled with a pack of lies repeated from the report of the discredited psychiatrist. He committed malpractice, ignored the evidence Doe tried to show him, ignored observations Doe's bosses tried to convey to the resident in his telephone calls to them, ignored the results of the 4-hour test that showed Doe was not mentally ill, and frustrated the efforts of the two colonels from the first MEB not to taint the process with the two documents. On the issue of fitness, all the evidence the resident had – conversations with Doe's bosses, written appraisals, letters of commendation, etc. - demonstrated that Doe's work performance was always outstanding. Analogous to a "new trial," the resident's January 13, 1999 Narrative Summary started a new disability process without the documentation from the first MEB.

Based solely on the resident's report (without copies of the two documents) and without Doe's input, the WHMC MEB ("second MEB") (A10) issued its January 28, 1999

determination that Doe should be retired for disability. Judge Braden has mistakenly confused these two MEBs into one MEB. The first MEB and the documents it had were never part of the administrative record. The second MEB report was affirmed by the WHMC Informal Physical Evaluation Board ("IPEB") (A11), which issued its adverse determination on February 23, 1999 after allowing Doe to submit a written letter.

Doe appealed the IPEB decision to the FPEB, which on April 2, 1999 denied Doe's lawyer's April 1, 1999 written request to call the resident (only a mile away) as a witness to the FPEB hearing. On April 9, 1999, after reading the resident's report (without the two documents in evidence), denying Doe's objection that the resident was not called to testify, and listening to Doe's brief testimony explaining Doe's belief that the President used Doe's ideas, the FPEB issued it's written adverse determination. (A12).

On May 19, 1999, the Secretary of the Air Force Personnel Council ("SAFPC") (A12-A13) without a hearing affirmed the FPEB determination.

The Air Force involuntarily retired Doe for disability officially on August 19, 1999 (A13) after he had taken his accrued leave.

On June 2, 1999, just before Doe's last work day, a colonel handed Doe a referral Officer Performance Report ("OPR") (A14-A15) rebuking Doe for making false accusations against the President. Doe had for months been removed from his position and had been shunned. Doe did not get the customary retirement ceremony and luncheon or the retirement medals, etc.

On June 4, 1999, as Doe was completing his last work day, Doe handed his lengthy rebuttal to the general (OPR reviewer). That general and colonel were the first people to actually evaluate Doe's claim. They also had the professional competence to make that evaluation because they were certified experts in military strategy (like Doe, all

generals, and less than 10% of all senior field grade officers), having graduated from ACSC or AWC in residence. (Doe was an outstanding graduate of AWC.)

Months later, Doe discovered the general and colonel had revoked the referral OPR and issued a new OPR praising Doe as a "visionary." Many months after that, Doe received a big brown package the general had mailed to Doe's last known address. The package was filled with medals, decorations, and awards with effusive praise of Doe. A14-A15.

Only a brief summary of the evidence that the President used Doe's ideas can be provided here.

On January 4, 1994, Doe submitted his AWC paper, which criticized the generals and other "experts" as incompetent and criticized Senator Sam Nunn's August 1992 hearings, which concluded air power would prove ineffective and no military solution could stop the daily killing in the Balkans. For example, Sam Nunn lacked the military skill to ask penetrating questions to unmask the errors of the Department of Defense ("DoD") experts. When the DoD experts testified that Serbian surface-to-air missiles ("SAMs") would stop U.S. aircraft, Sam Nunn should have asked them whether EF-111s and EA-6s could have blinded Serbian early warning radar and SAM radar, whether F-4G's could have nullified Serbian SAM effectiveness, whether strategic bombing by TLAMs and F-117s and other aircraft could have silenced the SA-7s and SA-9s, whether flying at high altitudes would evade the remaining medium and low-altitude SAMs, whether cutting their electricity off would disrupt SAM operations, whether cutting off communications to their tactical control centers and headquarters would spread confusion among the SAMs, etc.

Doe's AWC paper demonstrated how the military strategy could demonstrate to Milosevic that all his military capacity, industrial production facilities (and tax base), and supporting infrastructure would be destroyed if Milosevic did not agree to stop the genocide. Attached to that AWC paper was a

voluminous printout of Doe's computer simulation using the AWC software demonstrating in exact detail how the military strategy would work (which jets with which munitions on which targets and in what sequence with what percentage of destruction for each target). The U.S. would suffer only one combat loss – one jet.

On January 30, 1994, President Clinton called Nunn to the Oval Office, after which Nunn held a news conference. Abandoning all his conclusions from August 1992, Nunn articulated a radical new strategy for Bosnia. He abandoned the objectives the U.S. had had for decades and articulated verbatim the three radical new objectives Doe had written on pages 17 and 19 of his AWC paper. Nunn's new air-power-alone strategy used all Doe's policy changes and military tactics, identifying all of Doe's targets.

On February 6, 1994, President Clinton called his Secretaries of Defense, State, and Treasury to a National Security Council ("NSC") meeting to explain to them the new strategy.

Immediately, all the military experts condemned the new strategy. Chairman of the Joint Chiefs of Staff ("CJCS") Shalikashvili initially led the condemnations. Chief of Staff of the Air Force ("CSAF") General McPeak condemned the strategy saying he didn't understand it and didn't know where Clinton could have gotten such a wrong strategy. A year later, when Clinton implement that strategy, he had to relieve the Air Force general and Navy admiral in charge of the air attack for insubordination for refusing to carry out the bombings. After the war had progressed exactly as Doe's computer simulation had predicted, Milosevic begged for peace and agreed to the Dayton Accords to the amazement of everyone (except Doe and Clinton).

A few years later, conflict resurfaced in Kosovo, where Clinton tried to use the old strategy without accounting for the changed conditions and got himself into trouble. On March 31, 1999, Doe wrote the White House a letter adding

one new objective and numerous changes to the strategy detailing the specific target changes. Within days, Clinton announced that one new objective verbatim and implemented the target changes. The JCS, particularly CSAF Ryan, denounced the new changes and testified they would lead to disaster with pilots being shot down everywhere. The generals asked publicly where Clinton was getting all these sophisticated military ideas. General Clark went around Clinton's back and was unsuccessful in persuading NATO's political leaders to resist Clinton's new strategy. Again, to the amazement of everyone (except Doe and Clinton), Milosevic begged for peace and stopped the genocide. For the first time in history, a military campaign had been fought with zero combat deaths for the victor.

After unsuccessfully appealing to the AFBCMR (A13-A15), which provided no hearing, Doe unsuccessfully appealed to the CFC (A4-A34). From February 14, 2005 through May 30, 2005, Judge Braden and others perpetrated an elaborate fraud to keep her written opinion from Doe and deny him the opportunity to appeal. Many months later, when Doe discovered the fraud, he wrote Judge Braden a short letter explaining that her actions were prophesied in the Bible. She put the letter in the record and issued a new Judgment (A35) allowing Doe to appeal.

Scattered throughout the Old and New Testament are numerous related prophecies about an event in the far future when the whole world will be stunned by a "work" - the wisdom of the wise will be destroyed after many disbelieve a man pointing out these prophesies.

An appropriate staring point is prophecy written decades after the Crucifixion. Acts 13:40-41 predicts, "Beware therefore, lest that come upon you, which is spoken of in the prophets; Behold you despisers, and wonder, and perish: for I work a work in your days, a work which ye shall in no wise believe, though a man declare it unto you."

What is this "work" that the man will declare "in your days" to the target audience who will in "no wise" believe? Isaiah 29:14, among many other prophecies, defines this "work" as follows: "Therefore, behold, I will proceed to do a marvellous work among this people, even a marvellous work and a wonder: for the wisdom of their wise men shall perish, and the understanding of their prudent men shall be hid."

As for Judge Braden's actions, Habakkuk 1:4-5 predicts,

> Therefore the law is slacked, and the judgment doth never go forth; for the wicked doth compass about the righteous; therefore wrong judgment proceedeth. Behold ye among the heathen, and regard, and wonder marvellously: for I will work a work in your days, which ye will not believe, though it be told you.

That prophecy describes the delaying motions and rulings and shenanigans she, the trial attorney, and others perpetrated to defeat Doe's motion for judgment and allow the U.S.'s "wrong judgment" to proceed, and predicts the wisdom-destroying experiment that will soon follow.

That same theme is repeated in numerous other prophecies including Isaiah 59:14-16, which reads as follows:

> And judgment is turned away backward, and justice standeth afar off: for truth is fallen in the street, and equity cannot enter. Yea, truth faileth; and he that departeth from evil maketh himself a prey: and the Lord saw it, and it displeased him that there was no judgment. And he saw that there was no man, and wondered that there was no intercessor: therefore his arm brought salvation unto him; and his righteousness, it sustained him.

That prophecy describes a man, who is a plaintiff (not a defendant) in a formal court setting seeking an ever elusive judgment in a civil (not criminal) action. The man is an unrepresented *pro se* plaintiff ("no intercessor"). With truth unfairly blocked by that judicial system, the man is smeared with lies. As he tries to rid himself of one evil doer, another evil doer pounces on him. After the court denies the man justice, God intervenes and brings the man justice outside the court. The truth will come out after completion of the "work" – the event destroying the wisdom of the wise.

That theme that the man will eventually be victorious is repeated again and again in many prophecies. See, for example, Isaiah 44:25-26, which states, "That frustrateth the tokens of the liars, and maketh diviners mad; that turneth wise men backward, and maketh their knowledge foolish; That confirmeth the word of his servant,...." The experiment destroying the wisdom of the wise is the key to the man's salvation, getting the truth out, and shaming his enemies.

There are too many prophecies to quote here.

Doe appealed to the Fed. Cir. (1) the CFC's judgment and final memorandum order granting U.S.'s motion for judgment upon the administrative record pursuant to RCFC Rule 56.1 and (2) the order denying Doe's motion for RCFC Rule 11 sanctions. The Fed. Cir. affirmed (A1-A2) the CFC judgment but refused (A36-A37) a rehearing to issue a ruling on Doe's appeal of the RCFC Rule 11 Order.

Doe's complaint in the CFC alerted the trial attorney that two documents (the second doctor's report accompanied by the third doctor's addendum) were kept with the first doctor's (resident's) working papers at WHMC, but that the Air Force had intentionally omitted those flawed documents from the Air Force administrative record. The trial attorney observed first hand that the administrative record the Air Force had delivered to his office had only one doctor's statement – the resident's, not those of the second and third doctors.

Because of that limitation, he inserted a copy of the resident's report into his motion's appendix, but was forced to omit the other two documents. Despite this knowledge, the trial attorney attempted in his responsive motion to trick Judge Braden into thinking that the administrative record had more doctors' statements than the one.

Doe caught the trial attorney red handed and surprised him with Doe's exchange of letters with the Air Force FOIA Manager. Doe' FOIA request quoted the ambiguous words (like "opinions" (plural), "medical records" (plural), "summaries" (plural), etc. (used also in the singular)) from the AFBCMR, SAFPC, and FPEB determinations and asked for a copy of all written doctors reports other than the resident's report in the administrative record before those three boards. The FOIA Manger reported back that he had conducted a thorough search and had discovered no other doctor's reports – and not the two documents.

Despite this knowledge of the FOIA Manager's explicit negative finding and the quotation of those ambiguous terms in the request letter, the trial attorney persisted in claiming those ambiguous terms meant that the two documents were in the administrative record, went to WHMC, where the resident kept his working papers, got those copies of the two documents, put them into the CFC court record – twice (!), and fraudulently represented to Judge Braden that those two documents were in the Air Force administrative record. The trial attorney's supervisors continually ignored Doe's letters to them complaining about the trial attorney's misconduct.

ARGUMENT

I. 10 U.S.C. § 1214 Requires "Full and Fair Hearing" with Right to Confront and Cross-examine Adverse Witness

Commentators have often remarked that the overwhelming majority of American society does not bear any of the burden of fighting the war on terror leaving that burden for the service members. Tens of thousands of those service members return from that war either in flag-draped coffins or with psychological or physical injuries. Some have their faces torn away or have their arms or legs blown off, while many others have lesser injuries not shared by those civilians wearing flag pins on their lapels. Those injured service members, wanting to remain in the military, often face boards determining whether their injuries make them unfit for military service. Some, like General Shinseki, who lost his foot in Vietnam as a junior officer, convince those boards that their injuries do not make them unfit for military service.

Recognizing that service members often desire to remain on active duty, Congress, passed 10 U.S.C. § 1214, which provides, "No member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it." The phrase "if he demands it" establishes that Congress, who many of its members personally know the hardships of serving in the military, created this right as a benefit for the service member. Congress felt service members deserved more than just a "fair hearing." They deserved something much more. Congress felt service members deserved a ***full*** and fair hearing. So, what is this "full and fair hearing?"

AFI 36-3212 requires that the FPEB hearing serve as this "full and fair hearing;" so, if that FPEB hearing is not "full and fair," then the Air Force has no legal authority to retire or separate the service member for unfitness due to disability.

Silent about Doe's argument, Judge Braden and the Fed. Cir. indirectly held (A23 and A25) that the requirements of a "full and fair hearing" did not require the FPEB to grant the April 1, 1999 written request of Doe to call the resident (only a mile away) as a witness to his April 9, 1999 FPEB hearing. These judges have decided an important federal

question in a way that conflicts with relevant Supreme Court decisions, discussed below. Furthermore, these judges have decided an important question of federal law that should be settled by the Supreme Court, especially since the war on terror will probably last decades and inflict injuries on many more service members.

In *Townsend v. Sain*, 372 U.S. 293 (1963), this Court, in a *habeas corpus* case, decided what a "full and fair hearing" required. This Court established six tests for federal courts to measure the adequacy of state court procedures. The third test was "(3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; ...." *Townsend* at 313. At page 316, this Court elaborated on test 3 stating, "Even if all the relevant facts were presented in the state-court hearing, it may be that the fact-finding procedure there employed was not adequate for reaching reasonably correct results." It added at 316, "Even where the procedure employed does not violate the Constitution, if it appears to be seriously *inadequate for the ascertainment of the truth*, it is the federal judge's duty to disregard the state findings and take evidence anew." (Doe's emphasis.) So, a test for "full and fair hearing" is whether its procedures are *adequate for the ascertainment of truth*, independent of whether or not those procedures violate the Constitution.

This test concerning what is inadequate for the ascertainment of truth was defined by this Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970). At page 269, this Court wrote, "Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, *written submissions are a wholly unsatisfactory basis for decision.*" (Doe's emphasis.) It added at page 269, "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."

Together, the *Goldberg* and *Townsend Courts* require that a hearing is not a "full and fair hearing" if it is inadequate for

the ascertainment of truth because the decision-maker denied the opportunity to confront and cross-examine adverse witnesses, who's credibility and veracity were at issue, and instead relied on written submissions.

Goldberg justified its holding quoting extensively from *Greene v. McElroy*, 360 U.S. 474 (1959). At pages 496-497, the *Greene* Court wrote as follows:

> Certain principles have remained relatively immutable in our jurisprudence.... [I]t is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. (Lengthy footnote omitted.) They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, e. g., (lengthy citations omitted), but also in all types of cases where administrative and regulatory actions were under scrutiny. (Lengthy citations omitted.)

At footnote 25 on page 497, this Court remarked, "Professor Wigmore explains in some detail the emergence of the principle in Anglo American law that confrontation and cross-examination are basic ingredients in a fair trial.

5 Wigmore on Evidence (3d ed. 1940) § 1364." It added at 497-499 the following:

> Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, 5 Wigmore on Evidence (3d ed.) § 1367: "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

Doe was denied that opportunity to demonstrate the deficiencies in the resident's written report from the resident's own mouth.

A superficial analysis of *Richardson v Perales*, 402 U.S. 389 (1971) suggests the erroneous belief that one cannot cross-examine writers of written medical reports. Closer examination of that decision reveals that proposition is not always true and that the FPEB was wrong for denying Doe's request to confront and cross-examine the resident. The *Perales* Court at 402 held as follows:

> We conclude that a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and

> an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, *when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.* (Emphasis is Doe's.)

At 406-407, the *Perales* Court distinguished the *Perales* holding from its previous holding in *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970), which provided due process requires "an effective opportunity to defend by confronting any adverse witness." The *Perales* Court wrote that *Goldberg* "concerned a situation, the Court said, 'where credibility and veracity are at issue, as they must be in many termination proceedings.' 397 U.S. at 269." The Court added, "Further, the specter of questionable credibility and veracity is not present; there is professional disagreement with the medical conclusions, to be sure, but there is no attack here upon the doctor's credibility or veracity."

So, Doe's case can be distinguished from the *Perales* case on the facts. Unlike the *Perales* case, which involved a dispute over esoteric professional medical judgment, Doe's case involved, not just the resident's reasoning and medical malpractice, but the numerous false statements of fact, upon which he based his diagnosis and which he used to mislead other psychiatrists, and his dubious credibility. Unlike *Perales*, Doe requested the FPEB to call the resident as a witness so that he could confront and cross-examine him about the flaws in his report and entered his formal objection at the FPEB hearing. The rationale in the *Perales* case

demonstrates that the FPEB should have allowed Doe to cross-examine the resident.

In *Wallace v Bowen*, 869 F.2d 187, 192 (3rd Cir. 1988), the Third Circuit Court of Appeals interpreted *Perales* as authority that due process always requires confrontation and cross-examination of the author of a written medical report if the claimant, unlike Perales, requests a subpoena. The Court wrote "Effective cross-examination could reveal what evidence the physician considered or failed to consider in formulating his or her conclusions, how firmly the physician holds to those conclusions, and whether there are any qualifications to the physician's conclusions." Quoting another opinion, the Court added, "(Cross examination of the doctor to establish the psychiatric philosophy that formed the basis of his professional opinion could affect the weight given to [claimant's] testimony, especially where, as here, there exists evidence of record to support the plaintiff's contentions.)" Particularly applicable to Doe's case is the Court's comment that "Indeed, the need for cross-examination may be heightened when the physician's opinion is based on second-hand readings of other physician's medical reports." *Wallace* at 193.

The Fifth Circuit Court of Appeals also interpreted *Perales* as holding that "an opportunity for cross-examination is an element of fairness of the hearing to which a claimant is entitled." *Lidy v. Sullivan*, 911 F.2d 1075, 1077 (5th Cir. 1990). "Thus, we conclude that the better reading is that by requesting a subpoena, a claimant has the right to cross-examine an examining physician." *Lidy* at 1077.

The Eleventh Circuit Court of Appeals agreed with the Wallace Court that it violates a claimant's right to procedural due process for the Secretary to deny a claimant Social Security benefits based upon medical reports without giving the claimant an opportunity to subpoena and cross-examine the authors of such reports. *Demenech v Secretary of the*

Department of Health and Human Services, 913 F.2d 882, 884 (11th Cir. 1990).

Adding to the 10 U.S.C. § 1214 statutory right (but never subtracting), AFI 36-3212 provides that in a "full and fair hearing" the service member has the right to "present evidence." The FPEB denied Doe the right to "present evidence" from the resident's own mouth.

Because the FPEB violated Doe's 10 U.S.C. § 1214 statutory right to confront and cross-examine the resident and Doe's AFI 36-3212 regulatory right to present evidence at the 9 April 1999 hearing, the Administrative Procedure Act ("APA") at 5 U.S.C. § 706 (triggered by 28 U.S.C. § 1491(b)(4)), required Judge Braden to "hold unlawful and set aside agency action, findings, and conclusions found to be ... (C) ... short of statutory right; (D) without observance or procedure required by law ...." That includes setting aside the FPEB hearing and determination and the resulting August 19, 1999 retirement and SAFPC and AFBCMR reviewing determinations.

II. 10 U.S.C. § 633 Provides a Property Interest under Due Process Clause of the Fifth Amendment with Right to Confront and Cross-Examine Adverse Witness

Judge Braden and the Court of Appeals have destroyed the tenure rights of all regular general officers and senior field grade officers, including the Joint Chiefs of Staff, generals fighting the war against terror, and the brigade commanders and battalion commanders engaged in combat with terrorists in Iraq and Afghanistan. First, the bureaucrats deny them flak jackets and protective armor for their vehicles and force their injured to live in squalid housing at Walter Reed. And, now, these judges have destroyed their tenure rights.

Other lower court decisions have recognized these tenure rights, but the Supreme Court has never interpreted these

statutory rights. Judge Braden and the Court of Appeals have decided an important question of federal law that has not been, but should be, settled by the Supreme Court.

These tenure rights are codified at 10 U.S.C. §§ 633-636. § 636 guarantees major generals and above 35 years active commissioned service. §§ 634-635 guarantee brigadier generals and colonels 30 years, while § 633 guarantees lieutenant colonels 28 years. The relevant portions of these four sections are worded identically. The relevant part of § 633 states, " [E]ach officer of the Regular Army, Regular Air Force, or Regular Marine Corps who holds the regular grade of lieutenant colonel ... shall, if not earlier retired, be retired on the first day of the month after the month in which he completes 28 years of active commissioned service." Judge Braden's opinion (A31-A32), which the Fed. Cir. adopted, misinterpreted this wording and ignored legal precedents that had correctly interpreted § 633 to give the officer an *expectation of continued employment* for 28 years. She focused on the words "if not earlier retired" and assumed the military could involuntarily without due process retire the officer before the 28-year point (as opposed to the officer, himself, choosing to retire earlier).

An hypothetical demonstrates the fallacy of her misinterpretation. Most lieutenant colonels, like Doe, achieve that rank at the 16-year point – 4 years before they are eligible to retire. Since they cannot "retire" until 4 years later at the earliest and since § 633 gives only two possibilities (retire at 28 years or retire earlier), § 633 gives those officers an *expectation of continued employment* until, at a minimum, they can become eligible to retire.

Judge Braden ignored legal precedents (reflected in military practice) which guaranteed regular lieutenant colonels 28 years employment. This 28-year guarantee was an important fact, upon which the Fed. Cir. built one of its arguments in *Perez v. U.S.*, 156 F.3d 1366, 1368, 1369, and 1373. Fed. Cir. emphasized that Perez benefited from his

decision to give up his rank as an active-duty reserve colonel and integrate into the regular army as a lieutenant colonel stating the following: "[I]f he chose not to integrate, he would have to retire after 20 years of active-duty service, whereas if he integrated, he, as a lieutenant colonel, could remain in service for 28 years." *Perez* at 1373. It's patently dishonest for Fed. Cir. to rely on that 28-year expectation in *Perez* and then deny that same 28-year guarantee to Doe.

Judge Braden also quoted *Norman v. United States*, 183 Ct.Cl. 41, 49 (1968), out of context (A31). She ignored the very next sentence: "The status of these officers was not a common law contractual relationship with the Government, but was created entirely by statute and could be altered or taken away by statute." The Court wrote, "Under the Officer Personnel Act of 1947 [2] lieutenant colonels *could expect to continue active service until they had completed 28 years service* ...." (Emphasis is Doe's.) *Norman* at 45. The only way the Air Force could get around that "guaranteed" property right was for the Secretary of Defense to convince Congress to pass a second statute temporarily altering the first statute for a brief period of five years (July 12, 1960 through June 30, 1965). *Norman* at 44-48. If that statute had not been modified, the officers could be early retired only if they were accorded the full panoply of due-process rights including the right to cross-examination. With § 633 unmodified, as it was when Doe was involuntarily retired, the long line of well-established case law controls so that "[A] military officer's expectation of continued military employment does not rise to the level of a property interest unless it is rooted in some statute, regulation or contract." *Doe v. Garrett*, 903 F.2d 1455, 1462 (11th Cir. 1990). Doe can point to § 633 as that "statute." The military can involuntarily remove such officers before the 28-year point (for example, by court martial or disability retirement (or even discharge before the 20-year retirement eligibility kicks

in)), but it must give such officers all the Fifth Amendment due-process rights at a full and fair hearing or trial.

This military practice reflecting Doe's interpretation of § 633 creates a contractual right according to the Supreme Court's holding in *Perry v. Sindermann*, 408 U.S. 593, 601-602 (1972), recognizing property rights stemming from an implied contract based on understandings, conduct, and practice. The *Perez* case above reflected this common military practice and demonstrated that both the lieutenant colonel and the personnel office had an understanding that the 28-year guarantee existed and relied upon that understanding in their conduct and practice. The *Perez* court also recognized and accepted that practice. The *Norman* case above also reflected this common military practice. The Secretary of Defense believed the tenure rights existed and believed he had to go to Congress to modify the statute for a temporary five-year period so that the military could retire the lieutenant colonels and colonels without the normal due process rights through Selective Early Retirement Boards. The retired *Norman* lieutenant colonels and colonels also believed they had those tenure rights. The *Norman* court believed they would have had those tenure rights had the statute not been modified.

This property interest – stemming either (1) from the § 633 statute or (2) from an implied contract based on common military practice and conduct – triggers Doe's due process right under the U.S. Constitution's Fifth Amendment, which provides in relevant part, "No person shall be ... deprived of life, liberty, or property, without due process of law: ...."

According to the case law discussed in Section I above, that due-process right included Doe's right to cross-examine the resident.

Because the FPEB violated Doe's Fifth Amendment right to confront and cross-examine the resident at the April 9, 1999 FPEB hearing, the APA at 5 U.S.C. § 706 (triggered by 28 U.S.C. § 1491(b)(4)), required Judge Braden

to "hold unlawful and set aside agency action, findings, and conclusions found to be ... (B) contrary to constitutional right, ... (D) without observance or procedure required by law .... or (E) unsupported by substantial evidence." That includes setting aside the FPEB hearing and determination and the resulting August 19, 1999 retirement and SAFPC and AFBCMR reviewing determinations.

III. Department of Justice's Trial Attorney and His Supervisors Violated Rule 11

It's been said that the moral standards of an organization are shaped by its leader – not by formal written codes – but by the leader's conduct and by the examples set by subordinates' conduct that the leader rewards or allows to go unpunished. It's this unwritten code fostered by the leader's winks and nods that creates the environment in which ethics scandals occur in police departments, corporations like Enron, and other organizations.

Accordingly, RCFC Rule 11 (A39-A40) is not worth the paper it's written on if Judge Braden and the Fed. Cir. judges with a wink and a nod are allowed to give a pass to the trial attorney's fraudulent misconduct and the complicity of his supervisors. He perpetrated fraud and continued with that fraud after he was caught red handed.

The trial attorney attempted to trick Judge Braden into thinking the second MEB had the two documents. The trail attorney argued fallaciously that wording in the resident's January 13, 1999 report (with the ability to foresee the future?) meant that the second MEB (held at WHMC on January 28, 1999 – 15 days after the resident's report) had Doe's letter of exception (complaining about the two documents), rather than the first MEB (held in California two months before the resident's report on November 13, 1998).

Judge Braden, fully aware of the facts, did not challenge the trial attorney and denied Does' motion for Rule 11

sanctions with just a one-sentence order and no opinion (A3). After Doe appealed that terse Rule 11 Order to the Fed. Cir., the Fed. Cir. judges wrote absolutely nothing refusing (A36-A37) to comment about the Rule 11 violation and even refusing to issue a "disposition" of Doe's appeal of Judge Braden's Rule 11 Order (requested in Doe's rehearing motion). Those are winks and nods that encourage fraudulent attorney misconduct, that is so fraudulent and indefensible that Judge Braden and the Fed. Cir. judges dare not put anything in writing to justify their denial of Rule 11 sanctions. Such a written defense of that fraudulent attorney misconduct could come back to bite those judges and haunt their careers that someday might be scrutinized by others.

RCFC Rule 11 (A39-A40) provides that by presenting to the court a written motion or other paper, an attorney is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the allegations and other factual contentions have evidentiary support. The trial attorney went well beyond that standard. He perpetrated fraud and undermined the judicial process for determining truth and administering justice.

The Fed. Cir. judges have so far departed from the accepted and usual course of judicial proceedings and have sanctioned such a departure by Judge Braden, as to call for an exercise of the Supreme Court's supervisory power. The Supreme Court should make it clear that no litigant in this land should have his search for justice frustrated by fraudulent attorney misconduct like the trial attorney's.

CONCLUSION

Shortly, after this case concludes, erupting from a nuclear facility in Dubna, Russia will be shocking news that will surprise everyone (except Doe and Russian physicists working with him): A great discovery has destroyed

relativity and quantum mechanics – the basis of everything we know - and will require the laws of the universe to be rewritten. For years to come, people will look back on all this and tell the story about a man. While breaking into the man's home to search his working papers on FTL and time-travel physics, intruders stumbled upon his AWC paper, which found its way to the President of the United States. The President, against the objections of all his military experts, used those ideas to end the genocide in the Balkan conflicts saving perhaps the lives of millions. To discredit the man and cover up the illegal break ins and avoid impeachment, the President ordered his bureaucratic machine to demonize and mislabel the man as mentally ill and destroy the man's lifetime career and reputation. Afterwards, unjust judges and bureaucrats smeared the man, denied the truth, denied the man a full and fair hearing to reveal the truth, and disbelieved the man's declarations that Biblical prophecies had predicted all this. The unjust judges and others fulfilled the prophecies that all incensed against this blameless man shall be ashamed.

On that sunny day at West Point, when Doe raised his white-gloved hand to take his oath and tossed his white hat into the air, he had no idea that he would be betrayed by his Country – the President, the military, and the judicial system, that rendered the Constitution and statutes not worth the paper they were written on.

For the reasons discussed above, petitioner requests the Court to grant writ of certiorari.

Respectfully submitted,

s/_____

Dated: July 19, 2007 JOHN DOE
Pro Se Petitioner

APPENDIX

- Fed. Cir. Disposition, *John Doe v. United States*, 2006-5119, dated April 5, 2007.....1

- USCFC Order, *John Doe v. United States*, 04-90C, dated February 15, 2005.....3

- Memorandum Opinion and Final Order, 04-90C, *John Doe v. United States*, 66 Fed.Cl. 165-179 (2005).....4

- USCFC Judgment, *John Doe v. United States*, 04-90C, dated June 26, 2006.....35

- Fed. Cir. Order (Denying Rehearing), *John Doe v. United States*, 2006-5119, dated May 1, 2007.....36

- 5 U.S.C. § 706.....38

- Rule 11 of Rules of United States Court of Federal Claims ("RCFC").....39

APPENDIX

United States Court of Appeals for the Federal Circuit

2006-5119

JOHN DOE,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Judgment

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

In CASE NO(S). 04-CV-90.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED APR – 5 2007 s/_____
Jan Horbaly, Clerk

ISSUED AS A MANDATE: MAY 29 2007

(NOTE: Circuit Judges were Judge Mayer, Judge Rader, and Judge Prost.)

ORIGINAL

In the United States Court of Federal Claims

No. 04-90C
Filed: February 15, 2005

FILED

FEB 15 2005

U.S. COURT OF
FEDERAL CLAIMS

****

JOHN DOE,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

****

ORDER

In accordance with the telephone status conference conducted on February 14, 2005, plaintiff's Motion for Rule 11 Sanctions, filed September 16, 2004 is hereby DENIED.

IT IS SO ORDERED.

s/_____
SUSAN G. BRADEN
Judge

66 Fed.Cl. 165-179 (2005)

In the United States Court of Federal Claims

No.04-90C

Filed: June 30, 2005

TO BE PUBLISHED

****

JOHN DOE,

Plaintiff,

THE UNITED STATES,

Defendant.

* Administrative Procedure
* Act, 5 U.S.C. §§ 701,
* et seq.,;
* Basic Allowance for
* Housing,
* 37 U.S.C. § 403;
* Basic Allowance for
* Subsistence,
* 37 U.S.C. § 402;
* Fifth and Six Amendments
* to the United States
* Constitution;
* Medical and Dental Care
* for Members and Certain
* Former Members,
* 10 U.S.C. § 1074;
* Military Pay Act,
* 37 U.S.C. § 204;
* Pro Se;
* Tucker Act,
* 28 U.S.C. § 1491(a)(2);
* 10 U.S.C. § 630-36;
* 10 U.S.C. § 1201(a);
* 10 U.S.C. § 1214;
* 10 U.S.C. § 1552(a)(1),
* (2);
* AFI 36-3212 ¶ 3.17
* RCFC 56.1, Review of
* Decision on the Basis of

* Administrative Record.

****

John Doe, *pro se*, Plaintiff.

Gregory T. Jaeger, Esq., United States Department of Justice, Washington, D.C. for Defendant.

MEMORANDUM OPINION AND FINAL ORDER

Braden, *Judge*.

On January 26, 2004, John Doe ("Plaintiff") filed this action in the United States Court of federal Claims seeking compensatory and injunctive relief arising from a final decision of the United States Air Force ("Air Force") to retire Plaintiff because of medical disability.[1]

The court's review of the final decisions of the Armed Services is limited by well established United States Supreme Court and the United States Court of Appeals for the Federal Circuit precedent. *See, e.g., Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988). ("[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military [decisions.]"); *Gilligan v. Moran*, 413 U.S. 1, 10 (1973)("[D]ecisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments."); *see also Murphy v. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993) ("The court is not called upon to exercise any discretion reserved for the military[.]"; *Sargisson v. United States* 913 F.2d 918, 922

[1] On February 15, 2005, the court placed the record in this case under seal. Accordingly, Plaintiff's name and certain factual information have been omitted for confidentiality reasons.

(Fed. Cir. 1990) (deciding not to review a decision to release surplus officers from active duty).

The United States Court of Appeals for the Federal Circuit has established a two-part test to assist the court in exercising its jurisdiction within these constraints:

> [First, the court must ascertain] 'whether the duty asserted can be judicially identified and its breach judicially determined, and [second] whether protection for the right asserted can be judicially molded....' We have emphasized that *judicial review* is only *appropriate where the Secretary's discretion is limited, and Congress has established 'tests and standards'* against which the court can measure his conduct.... Unless such a test or standard is provided, courts must abstain.

Murphy, 993 F.2d at 872-73 (emphasis added) (citations omitted).

Accordingly, in this case, the court has no authority to evaluate the merits of Plaintiff's contentions that: former President Clinton's Bosnian War strategy was influenced or appropriated from Plaintiff's Air Command and Staff College scholarship, without proper attribution; or the medical opinions that recommended Plaintiff's retirement for disability were superficial or inadequate. This court's jurisdiction "is [limited] solely [to] whether the [final] decision...violated any statute, regulation, or the fundamental due process that the Constitution provides to all persons." *Holley v. United States*, 124 F.3d 1462, 1468 (Fed. Cir. 1997).

As will be discussed in more detail herein, the court has determined that the Air Force did not violate any statute, regulation, or provision of the United States Constitution. Accordingly, as a matter of law, the court is required to grant

Defendant's Motion for Summary Judgment on the Administrative Record. As the Addendum indicates, however, this decision does not rest easy with the conscience of the court.

RELEVANT FACTS AND PROCEDURAL BACKGROUND[2]

A. Factual Background

1. Plaintiff's Service in the United States Army, United States Army Reserve, And United States Air Force in 1965-1997.

In 1965, Plaintiff enlisted in the United States Army. See Def. Supp. Ex. At 4. After completing the military's foreign language school, Plaintiff was selected to attend the United States Military Academy Preparatory School and the United States Military Academy ("West Point"). *Id.* At West Point, Plaintiff studied nuclear physics and had an "outstanding [academic and professional] record." *See* Pl. App. at 38. Following graduation, Plaintiff served as a Platoon Leader for a missile battery in Europe, until he voluntarily was released from active duty in 1975. *See* Def. Supp. Ex. At 4.

[2] The relevant facts recited herein were derived from: the January 26, 2004 Complaint ("Compl"); the Defendant's ("Government") May 28, 2004 Motion for Judgment Upon the Administrative Record (Gov't Mot. J. Admin. Rec.") and Appendix thereto ("Def. App."); Plaintiff's June 18, 2004 Opposition ("Pl. Opp."); the Government's July 30, 2004 Reply ("Gov't Reply"); Plaintiff's September 16, 2004 Motion for Rule 11 Sanctions ("Pl. Mot. For Sanctions"); the Government's October 20, 2004 Response thereto (Gov't Resp.") and Supplemental Exhibit ("Def. Supp. Ex."); Transcript of April 6, 2005 Status Conference (TR "); and Plaintiff's April 25, 2005 Motion for Partial Judgment Upon the Administrative Record ("Pl' Mot. Partial J. Admin. Rec.") and Appendix thereto ("Pl. App.").

From 1975 to 1978, Plaintiff attended law school, *Id.* Following graduation and admission to the bar, he served as Administrative law Judge from 1979 to 1981. Id. At 5; *see also* Pl. App. at 54. During that time, Plaintiff also participated in the United States Army Reserve until March 28, 1981 on or about the time he joined the United States Air Force ("Air Force") as a Judge Advocate General ("JAG") Officer. *See* Def. App. at 1; *see also* Def. Supp. Ex. At 5. In 1985, Plaintiff transferred to the Air Force's Acquisition and Contracting Department. *See* Def. Supp. Ex. At 5. Thereafter, Plaintiff successfully completed tours of duty at the Air Command and Staff College ("AWC"), where he was given an outstanding graduate award, and at the Defense Personnel Support Center. *Id.*; *see also* Compl. ¶ 14. In 1996, while stationed at a Headquarters, Air Force Material Command, Plaintiff received a Letter of Admonishment regarding alleged sexual harassment charges that were filed during his three-month temporary assignment to Saudi Arabia. *See* Def. Supp. Ex. At 2, 5; Pl. App. at 5-6. With the exception of this reprimand, Plaintiff had an excellent record of service in the Air Force. *See* Def. Supp. Ex. At 4-5.

On July 16, 1997, shortly before being transferred to the 77th Communications Squadron, Plaintiff sent a hostile letter to former President Clinton complaining "that the strategies [the President] used in 1994 and 1995 to resolve the Bosnian situation came from [Plaintiff's AWC] research paper." *See* Def. Supp. Ex. at 1. After the White House staff received a second letter on February 18, 1998 to the same effect, the Air Force Liaison Officer contacted Plaintiff's supervisor and requested that Plaintiff undergo a "Command Directed [Mental Health] Evaluation" ("CDE").[3] Id.; see also Pl. App.

[3] In 1988, Plaintiff received a CDE after the Director of one of the National Laboratories reported to the Air Force Office of Special Investigations that Plaintiff requested use of the lab to confirm his

at 4. On May 4, 1998 and August 17, 1998, Plaintiff was evaluated by the Element Chief that he was the subject of Biblical prophecy, was pursuing Russian resources to allow him to complete research on time travel theories, and indicated that he was unable to reconcile his grievances about the alleged use of his AWC research paper, without attribution. *See* Def. Supp. Ex. at 9-10. Plaintiff was diagnosed as having a "Delusional Disorder, Mixed Type, with prevalent Grandiose and Persecutory Themes." *See* Def. Supp. Ex. at 8. Thereafter, the Element Chief advised a Medical Evaluation Board ("MEB")[4] that Plaintiff should be removed from active duty service. *See* Def. Supp. Ex. at 8, 10; *see also* Pl. Opp. At 4. Plaintiff objected and requested a second opinion. See Def. Supp. Ex. at 11. On October 8, 1998, Plaintiff was evaluated by another Air Force base mental health Clinic. Id. On October 15, 1998, the Flight Commander of the second Air Force Mental Health Clinic issued a Narrative Summary that concurred with the Element Chief's diagnosis and recommended to the MEB that Plaintiff be removed from service. *See* Def. Supp. Ex. at 12.

2. Medical Evaluation Board Proceeding In January 1999.

Sometime in early January 1999, the MEB President

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theories on time travel. *See* Def. Supp. Ex. at 1. Plaintiff states that the lab misrepresented the situation and no further action was taken. *Id.*

[4] The MEB consists of Air Force Medical Officers who evaluate a service member's medical history, recommend the disposition of the case, and refer it to the final approving authority. *See* AFI 36-3212 § 2.2. Under the Air Force's Medical Examination and Standards Instruction, "[a]ny condition in the opinion of the provider of care [that] is felt to be unacceptable for continued military service is reason for performing a MEB for active duty [service members]. . . . Questionable conditions should be addressed to the senior [medical] officer, and if required, to HQ AFPC DPAMM[.]" AFI 48-123 Attachment 2.

requested that additional medical testing be conducted prior to the entire Board convening. *See* Pl. Opp. ¶ 5. On January 13, 1999, a Psychiatric Resident prepared a Narrative Summary, wherein he diagnosed Plaintiff as a psychotic afflicted with delusional disorder. *See* Compl. ¶ 6; *see also* Def. App. at 61. Prior to finalizing and submitting this Narrative Summary, the Psychiatric Resident reviewed his diagnosis with a third Air Force Medical Center's "entire psychiatry staff," including the Program Director, who co-signed the final January 13, 1999 Narrative Summary. *See* Def. App. at 65. On January 28, 1999 the MEB issued a report referring this matter to an Informal Physical Evaluation Board ("IPEB"). *Id.* at 60.

3. Informal Physical Evaluation Board and Formal Physical Evaluation Board Proceedings in February-April 1999.

On February 14, 1999, Plaintiff submitted a 23-page Letter of Exception to the IPEB[5] contesting the MEB's decision:

> That letter provided abundant documentary evidence and advanced arguments that [former] President Clinton borrowed ideas from Plaintiff's AWC paper to formulate his military strategy in Bosnia. That documentary evidence included a copy of Plaintiff's AWC research paper and AWC documents from the

[5] AFI 36-3212 § 3.1 provides: "A [Physical Evaluation board ("PEB")] is a fact-finding body that investigates the nature, origin, degree of impairment, and probable permanence of the physical or mental defect or condition of any member whose case it evaluates. The disability system provides for two PEBs: an Informal PEB and a Formal PEB. If either board finds the member unfit, it recommends appropriate disposition based on the degree of impairment caused by the disabling condition, the date incurred, and the member's line of duty status."

> AWC faculty designating Plaintiff as [an] Outstanding Graduate among the colonels and lieutenant colonels in the 1994 AWC course. That evidence and those arguments...later persuaded certified experts on military strategy that Plaintiff's claim against [former] President Clinton was true, despite their initial belief to the contrary.

Compl. ¶ 128.

On February 23, 1999, the IPEB recommended that Plaintiff "be permanently retired with a 30% compensable disability rating." *Id.* At 58-59.[6] On February 24, 1999, Plainitff requested a "full and fair hearing," pursuant to 10 U.S.C. § 1214,[7] and filed a Letter of Exception contesting the Psychiatric resident's January 13, 1999 Narrative Summary, the MEB recommendation, and the IPEB findings. *See* Compl. ¶¶ 8-11. Plaintiff's appeal of the IPEB's determination then was forwarded to a Formal Physical Evaluation Board ("FPEB").[8]

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[6] As part of the disability evaluation process, the Air Force assigns a percentage rating to a medical defect or condition when the member is physically unfit for duty. *See* AFI 36-3212 §§ 1.7, 1.9. Under Title X, the Air Force uses the Department of Veterans Affairs scheduling for Rating Disabilities ("VASRD") to quantify compensable disabilities. *Id.* 10 U.S.C. § 1201(b) authorizes the appropriate service Secretary to retire service members for disability if they have completed 20-years of service or they have a VASRD disability rating of 30%. Plaintiff was eligible to be retired under either of these criteria.

[7] 10 U.S.C. § 1214 provides: "No member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it."

[8] Once an IPEB determines that a service member is unfit for continued military service, the member can request another hearing before a FPEB where the service member can challenge the MEB's recommendation again. *See* Physical Disability Evaluation, Dept. of Defense Instruction

Prior to the FPEB's hearing, Plaintiff's appointed counsel requested that the Psychiatric Resident who issued the January 13, 1999 Narrative Summary be made available for cross-examination. *See* Compl. ¶¶ 14-15; *see also* Pl. App. at 15. On April 2, 1999, the FPEB President denied that request, but stated that if "the available medical information in [Plaintiff's] case is insufficient or inaccurate, then the Board will order additional medical consultants/opinions as appropriate." *See* Pl. App. at 67. During the April 9, 1999 FPEB hearing, Plaintiff's counsel objected to being denied the ability to cross-examine the Psychiatric Resident; however, Plaintiff testified and "provided evidence and advanced arguments that [former] President Clinton (1) borrowed ideas from Plaintiff's AWC paper to formulate his military strategy in Bosnia and (2) used ideas from Plaintiff's March 31, 1999 letter to make changes in [former] President Clinton's...military strategy in Kosovo." Compl. ¶ 131; *see also id.* ¶¶ 122, 125, 128, 132-137. On April 9, 1999, the FPEB issued a final decision concurring with the IPEB's recommendation that Plaintiff was unfit for further military service. *See* Def. App. at 56-57.

4. Secretary of the Air Force Personnel Command Proceeding in April-May 1999

On April 20, 1999, Plaintiff filed a timely appeal of the FPEB's April 9, 1999 final decision to the Secretary of the Air Force Personnel Command ("SAFPC"). See Compl. ¶ 25. The Senior Legal Advisor to the SAFPC

1332.38 Encl. 3 at 19 (Nov. 14, 1996). Service members who contest the IPEB's fitness determination before a FPEB are provided with legal counsel and the opportunity to present evidence on their behalf and make a personal appearance. *See* Pl. App. at 134. Pursuant to Air Force regulations, a FPEB determination satisfies the statutory requirement for a "full and fair hearing." *See* AFI 36-3212 § 3.2; *see also* Pl. App. at 130.

Director, however, concluded that Plaintiff "did not present any compelling arguments to support his contention [of lack of due process.]" Def. App. at 54; see also Compl. ¶ 26. On May 19, 1999, SAFPC issued a final decision affirming the FPEB's decision. See Def. App. at 54-55. On June 8, 1999, Air Force Personnel Command issued Special Order No. ACD-00882, pursuant to 10 U.S.C. § 1201(a),[9] setting Plaintiff's mandatory retirement date for August 19, 1999. Id at 53. On August 19, 1999, Plaintiff was retired by the Air Force because of disability. Id. at 6.

5. Air Force Board for Correction of Military Records

On December 15, 2000, Plaintiff properly petitioned the Air Force Board for Correction of Military Records ("AFBCMR")[10] to correct his disability evaluation and associated military records "by revocation" of the FPEB's April 9, 1999 decision and restore him to active duty. *See* Compl. ¶ 33. In support, Plaintiff proffered a medical evaluation conducted on December 10, 1999 by a Department of Veterans Affairs ("VA") physician that concluded: "Currently I am unable to confirm the diagnosis of delusional disorder. Through a series of retrospective connections and

[9] 10 U.S.C. § 1201(a) provides: "Retirement.—Upon a determination by the Secretary concerned that a member [of a regular component of the armed forces] is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay...the Secretary may retire the member, with retired pay computed under section 1401 of this title[.]"

[10] The AFBCMR is comprised solely of civilian employees authorized by Congress to change any military record, when it is necessary to correct an error or remove an injustice. *See* 10 U.S.C. §§ 1552(a)(1), (2). The AFBCMR is the final administrative appeal level to correct service records. *See* Def. App. at 130; *see also Strickland v. United States*, 61 Fed. Cl. 443, 452 (2004).

inferences it is possible that another evaluator might have made the diagnosis of a mental disorder but I cannot corroborate this at this time." Def. App. at 72; *see also* Pl. App. at 48.

On February 23, 2001, AFBCMR forwarded Plaintiff copies of advisory opinions written by the AFBCMR's legal and medical advisors concluding that the Air Force provided Plaintiff with a "full and fair hearing" concerning the circumstances surrounding his retirement. *See* Def. App. at 102-05; *see also* Compl. ¶¶ 34-35. AFBCMR's Legal Advisor also determined that the Air Force satisfied all applicable regulations. *See* Def. App. at 104-05. In addition, AFBCMR's Medical Officer concurred with the FPEB and distinguished the VA physician's December 10, 1999 evaluation in light of prior opinions issued by Air Force mental health personnel, particularly since the VA physician's analysis was based on a single meeting, without access to Plaintiff's military and medical records. *See.* Def. App. at 102-03. On March 20, 2001, Plaintiff filed a Response. *See* Compl. ¶ 35. On June 3, 2001, the AFBCMR denied Plaintiff's petition, adopting the position of the aforementioned advisory opinions and concluding that "insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice." Def. App. at 1-3; *see also* Compl. ¶ 36.

On March 20, 2002, Plaintiff requested that the AFBCMR reconsider his petition for correction based on "new evidence," i.e., that a former Secretary of the Treasury's wife telephoned Plaintiff to advise him that "President Clinton may very well have presented the ideas from Plaintiff's AWC paper to [the former Secretary] and the other national Security Council members on 6 February 1994 as a new unconventional military strategy for the conflict in Bosnia. That request also related information about several science fiction authors...and [that certain Air Force officers] had revoked the adverse referral Officer Performance Report

("OPR") and replaced it with an outstanding OPR, and that long after Plaintiff had retired [these officers] arranged for Plaintiff to receive numerous awards and decorations, placed them in a brown package and mailed the package to Plaintiff's last know address." Compl. ¶ 142. On May 2, 2002, the Director of the AFBCMR advised Plaintiff that his request for reconsideration was rejected. *See* Def. App. at 129; *see also* Compl. ¶ 143. On July 9, 2003, the Director of the AFBCMR notified Plaintiff that the evidence submitted in another letter dated June 18, 2003 was not relevant and that all future submissions would be "filed without action." *See* Def. App. at 130.

B. Procedural History.

On January 26, 2004, Plaintiff filed a timely Complaint in the United States Court of Federal Claims seeking compensation and injunctive relief arising from the Air Force's decision to retire him with a medical disability. *See* Compl. ¶¶ 1-5. The Complaint states five Causes of Action that are interrelated and often redundant.

The First Cause of Action alleged that the Air Force

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[11] The First Cause of Action alleged a violation of the Takings Clause of the Fifth Amendment. *See, e.g.*, Compl. ¶¶ 12-13, 15-16, 20-25, 35-37, 39, 45-52. A violation of the Due Process of the Fifth Amendment is also asserted and a violation of the Confrontation Clause of the Sixth Amendment is implied. *Id.* ¶¶ 12, 14-25, 27, 29, 33, 35-37, 39, 52.

[12] The First Cause of Action also alleged a violation of the following statutes: 10 U.S.C. § 633 (requiring 28 years of active commissioned service before retirement) *see e.g.*, Compl. ¶¶ 2, 14; 10 U.S.C. § 1214 (No member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it."), *see e.g.*, Compl. ¶¶ 9-11, 22, 24, 29, 39-44, 52(a)-(f); 37 U.S.C. § 204 ("Pay and Allowances of the Uniformed Services"), *see, e.g.*, Compl. ¶¶ 2, 14; 37 U.S.C. § 402 ("Basic Allowance for Subsistence"), *see, e.g.*, Compl. ¶¶ 2, 14, 46-51; 37 U.S.C. § 403 ("Basic Allowance for Housing"), *see, e.g.*, Compl. ¶¶ 2, 14, 46-51; 10 U.S.C. § 1074 ("Medical

violated a series of constitutional,[11] statutory,[12], and regulatory rights.[13] *See* Compl, ¶¶ 6-53. As a result, the Air Force "unlawfully retired Plaintiff...and has refused to correct his military records or afford any other administrative relief to which he is entitled." *Id.* ¶ 53.

The Second Cause of Action alleged that the Air Force engaged in a series of acts in "bad faith," including violating Plaintiff's "constitutional rights by depriving him of property and liberty without due process of law." *Id.* ¶ 66; *see also id.* ¶¶ 54-65, 67.

The Third Cause of Action alleged that the Air Force violated AFI 36-3212 § 3.17 (Presumption of Fitness) by the unlawful retirement of Plaintiff and refusal to correct his military records. *Id.* ¶¶ 68-103

The Fourth Cause of Action alleged that the Air Force's decision not to accord "due weight" to the VA physician's December 10, 1999 examination rendered the AFBCMR decision "(1) arbitrary, capricious, or an abuse of discretion and (2) unsupported by substantial evidence" and therefore legally insufficient. *Id.* ¶¶ 118-119; *see also id.* ¶¶ 104-117, 120.

The Fifth Cause of Action alleged that the Air Force's "forced disability retirement of Plaintiff and denial of his application to the AFBCMR, Defendant's determinations, documents, and actions were (1) arbitrary, capricious, or an abuse of discretion, (2) unsupported by substantial evidence and not in accordance to law," *Id.* ¶ 197; *see also id.*

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and Dental Care for Members and Certain Former Members'). *see, e.g.*, Compl. ¶¶ 2, 14, 46-51; 10 U.S.C. § 1552(a)(1) ("Secretary of a military department may correct any military record...to correct or remove an injustice."). *See, e.g.*, Compl. ¶¶ 32, 53.

[13] In addition, the First Clause of action alleged violations of ¶ 3.2 of AFI 36-3212 (Legal Basis for Formal hearings), *see, e.g.*, Compl. ¶¶ 10, 19-22, 24, 29, 31, 39, 52-53, and Terms-Attachment 1 (Full and Fair Hearings). *See, e.g.*, Compl. ¶¶ 10, 31, 35, 52-53.

¶¶ 121-196, 198.

On May 28, 2004, the Government filed a Motion for Judgment on the Administrative record, together with a Statement of Facts in Support Thereof. On June 18, 2004, Plaintiff filed a Brief in Opposition, together with a Counter Statement of facts. On August 3, 2004, the Government filed a Reply. On August 17, 2004, Plaintiff filed a Protest/Objection to fraud Perpetrated in the Defendant's Reply to Plaintiff's Response to defendant's Motion for Judgment Upon the Administrative record." On September 9, 2004, the Government filed a Response. On September 14, 2004, Plaintiff filed a Reply. On September 16, 2004, Plaintiff filed a Motion for Rule 11 Sanctions. On October 20, 2004, the Government filed a Response.

On February 15, 2005, the court denied Plaintiff's Motion for Rule 11 Sanctions. In addition, on February 15, 2005, the court appointed pro bono counsel to represent Plaintiff and issued a 60-day stay of proceedings.[14] During an April 6, 2005 status conference, the court asked the parties to explore a potential settlement. On April 25, 2005, Plaintiff "discharged" appointed counsel informing the court that Plaintiff would not agree to any settlement unless one of the provisions mandated his return to service. Plaintiff's "discharge" was based on a misunderstanding about the

DISCUSSION

[14] The United States Court of Federal Claims maintains a list of attorneys experienced with Disability Appeals and Veterans Affairs regulations willing to provide pro se assistance to current and former members of the Armed Services who file lawsuits against the Government. Professor James T. O'Reilly of the University of Cincinnati College of Law, a member of the United States Court of Federal Claims Pro Bono Program and former Chairman of the American Bar Association's Section on Administrative Law and Regulatory Practice, was appointed by the court to serve as Counsel to Plaintiff.

nature of the April 6, 2005 status conference. Accordingly, the court has not acted on Plaintiff's unilateral "discharge." On that same day, Plaintiff filed a Motion for Partial Judgment on the Administrative record.

A. Jurisdiction.

The United States Court of Federal Claims has been authorized by Congress to "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). In *United States v. Mitchell*, 445 U.S. 535, 538 (1980), however, the United States Supreme Court held that the Tucker Act does not create any substantive right for monetary damages. Therefore, a plaintiff must identify and plead an independent contractual relationship, constitutional provision, federal statute, and/or executive agency regulation that provides a substantive right to money damages in order for the court to have jurisdiction. *See Khan v. United States*, 201 F.3d 1375, 1377 (Fed. Cir. 2000); *see also Fisher v. United States*, 402 F.3d 1167, 1173-74 (Fed. Cir. 2005) (*en banc*) (emphasis in original) (recognizing that *United States v. White Mountain ApacheTribe*, 537 U.S. 465, 472-73 (2000) articulated a new test that "demands a showing demonstrably lower.... It is enough that a statute creating a Tucker Act right be *reasonably amenable to the damages... a fair inference* will do.")

Although the Tucker Act does not provide independent jurisdiction over claims for declaratory or injunctive relief,

[15] 28 U.S.C. § 1491(a)(2) states: "To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an

the court has authority to provide equitable relief if the action is collateral to a claim for monetary damages.[15] See *Brown v. United States*, 105 F.3d 621, 624 (Fed. Cir. 1997) ("The Tucker Act does not provide independent jurisdiction over such claims for equitable relief."); *see also Passaro v. United States*, 774 F.2d 456, 459 (Fed. Cir. 1985) ("Equity to the extent that it can be administered by the [United States Court of Federal Claims], exists as an incident of general jurisdiction under the Tucker Act[.]").

The Complaint properly alleges a money mandating statute by invoking the Military Pay Act, 37 U.S.C. § 204, since that Act in relevant part, provides: "a member of the uniform service who is on active duty...[is] entitled to basic pay of the grade to which assigned." *37 U.S.C. § 204;* see also Martinez v. United States, 333 F.3d 1295, 1303 (Fed. Cir. 2002) (*en banc*) ("In the context of military discharge cases, the applicable 'money-mandating' statute that is generally invoked is the Military Pay Act, 37 U.S.C. § 204[,]"). The Complaint also properly alleges 26 U.S.C. § 1491(a) as a basis to review the correction of military records. *See Voge v. United States*, 844 F.2d 776, 781 (Fed. Cir. 1988).

B. Justiciability.

When legal challenges to final military decisions are raised, the court is obligated first to consider the justiciability of the legal question presented. *See Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953). ("[J]udges are not given the task of running the [military]. The responsibility for setting up

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incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States."

channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates."); *see also Murphy v. United States*, 993 F.2d 871, 874 (Fed. Cir. 1993) ("[J]udicial review is only appropriate where the Secretary [of the Air Force]'s discretion is limited, and Congress has established 'tests and standards' against which the court can measure his conduct.") The United States Court of Appeals for the Federal Circuit specifically has held that determining who is fit or unfit to serve in the armed forces does not fall within the judicial province. *See Heisig v. United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983) (holding that the merits of the military's decision to release a service member from active duty are non-justiciable).

Although the merits of a fitness to serve determination are non-justiciable, the United States Court of Appeals for the Federal Circuit nevertheless has recognized that the United States Court of Federal Claims has limited authority to adjudicate a constitutional challenge arising from a procedure used by the Armed Forces. *See Atkins v. United States*, 68 F.3d 1317, 1323 (Fed. Cir. 1995) (emphasis in original) 9"[A]lthough the *merits* of a decision committed wholly to the discretion of the military are not subject to judicial review, a challenge to the particular *procedure* followed in rendering a military decision may present a justiciable controversy."); *see also Murphy*, 993 F.2d at 873 ("When the military is given unlimited discretion by Congress, it is nevertheless bound to follow its own procedural regulations if it chooses to implement some.") Therefore, when the Armed Forces have issued a final decision, the court can intervene only to ensure that the decision was made in a proper procedural manner. *See Wagner v. United States*, 365 F.3d 1358, 1361 (Fed. Cir. 2004) ("[W]e will not disturb the decision of the corrections board unless it is arbitrary, capricious, contrary to law, or unsupported by substantial evidence."); *see also*

Carmichael v. United States, 298 F.3d 1367, 1373-74 (Fed. Cir. 2002) ("If the Navy failed to follow its own policies and did not properly provide [plaintiff] with religious accommodation procedures, [plaintiff's] discharge may be involuntary because he was faced with the untenable option[.]"); *Voge*, 844 F.2d at 779 ("Though the question of fitness to serve may be nonjusticiable in various contexts, we Have consistently noted that a challenge to a particular procedure followed by the military in rendering a decision may present a justiciable issue."); *Murphy*, 993 F.2d at 873-74 (holding that the United States Court of Federal Claims may decide whether the military followed procedures set forth in its own regulations.

C. Standard Of Review For Final Decisions In Military Cases.

This case presents a justiciable controversy since the Military Pay Act provides monetary damages, and the standards by which the court measures the Air Force's procedures are defined by the APA, which provides that substantive standard under which final actions may be subject to review by the United States Court of Federal Claims, i.e., "whether the...action was arbitrary, capricious, or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation or mandatory published procedure of a substantive nature by which [the complainant] has been seriously prejudiced... The standard in these cases is broadly referred to as the 'substantial evidence' rule." *Heisig*, 719 F.2d at 1156; *see also Voge*, 844 F.2d at 779 ("[T]he [United States Court of Federal] Claims... may review the [challenged] process for compliance with established procedures."); *Clayton v. United States*, 225 Ct. Cl. 593, 594 (1980) ("Since there is a strong presumption that the AFBCMR faithfully discharged their duties, plaintiff has the burden of proving otherwise.")

As a matter of law, the court's review of the SAFPC's May 19, 1999 final decision no to overturn the FPEB's April 9, 19999 final decision that Plaintiff was unfit for continued military service and its issuance of Special Order No. ACD-0882 mandating Plaintiff's retirement for a medical disability is limited to determining whether that final decision was "arbitrary, capricious, or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation, or mandatory published procedure." *See Fisher*, 402 F.3d at 1180 ("[E]ligibility for disability retirement pay…is conducted under a deferential standard of review[.]"}. Likewise, the court's review of the AFBCMR's June 3, 2001 final decision not to correct Plaintiff's disability evaluation and associated military records by revoking the FPEB's April 9, 1999 final decision and the SAFPC's May 19, 1999 final decision is limited to procedural compliance, not the underlying merits. *See Chappell v. Wallace*, 462 U.S. 296, 303 (1983) ("[M]ilitary correction board] decisions are subject to judicial review [by the federal courts] and can be set aside if they are arbitrary, capricious, and not based on substantial evidence.")

D. Judgment On The Administrative Record.

The standard of review for a Motion for Judgment on the Administrative Record, pursuant to RCFC 56.1, is similar but not identical to a motion under RCFC 56 for summary judgment. *See Bannum, Inc. v. United States*, 404 F.3d 1346, 1355 (Fed. Cir. 2005). The inquiry on a motion for summary judgment is whether the moving party has proved its case as a matter of fact and law or whether a genuine issue of material fact precludes judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In contrast, the standard of review on a Motion for Judgment on the Administrative Record is narrower, i.e., given all the disputed and undisputed facts, whether the plaintiff has meet the burden of

proof to show that the decision was not in accordance with the law. *See Bannum*, 404 F.3d at 1357 (instructing the court to make "factual findings under RCFC 56.1 from the [limited] record evidence as if it were conducting a trial on the record."). In the case of a final military decision, the review of the Administrative Record further is limited to determining whether applicable procedures were followed or not and is supported by "substantial evidence." *See Heisig*, 719 f.2d at 1156 ("[C]ourts cannot substitute their judgment for that of the military departments when reasonable minds could reach differing conclusions on the same evidence."). Specifically, the court may not retry the case on the merits. *Id.* at 1157.

E. The Court's Resolution of the Issues in This Case.

1. The SAFPC's May 19, 1999 And AFBCMR's June 3, 2001 Final Decisions Were Supported By Substantial Evidence.

The First and Fifth Causes of Action allege that the SAFPC's May 19, 1999 final decision to retire Plaintiff and AFBCMR's June 3, 2001 final decision to deny Plaintiff's request to revoke his August 19, 1999 involuntary disability retirement were arbitrary, capricious, an abuse of discretion, and unsupported by substantial evidence. *See, e.g.*, Compl. ¶¶ 10, 19-22, 24,29,31,39, 52-53; *see also* Compl. ¶¶ 121-198. The Complaint also alleges that the records and proceedings leading to Plaintiff's disability retirement were in error, unjust, and should be deleted from his Air Force service record. *See, e.g.*, Compl. ¶¶ 2-4; *see also* Def. App. at 1. The linchpin to these claims is the allegation that the Psychiatric Resident's diagnosis and January 13, 1999 Narrative Summary were contrary to and directly confronted by evidence that Plaintiff provided to the

multiple evaluation boards through personal testimony, affidavits, and legal briefs. *See, e.g.*, Compl. ¶¶ 9-11, 22, 24, 29, 39-44; *see also* Def. App. at 6, 9-45, 74-75, 107-126, and 127. Indeed, if Plaintiff had done so, the President of the FPEB indicated that he would have requested further evaluation. *See* Def. App at 67. Plaintiff, however, failed to do so. Plaintiff never supplied the MEB, IPEB, FPEB, or SAFPC with any independent medical evidence to contradict the diagnosis of the Psychiatric Resident or the January 13, 1999 Narrative Summary.

Although AFBCMR was provided with an evaluation conducted by a VA physician, that evaluation was qualified since the VA physician did not have access to Plaintiff's prior meetings or medical records. *See* Def. App. at 4, 54. AFBCMR not only considered the unanimous findings of the MEB, IPEB, FPEB, and SAFPC, but also requested a separate advisory opinion of a Chief Medical Consultant from the Air Force personnel Command's Physical Disability Division ("AFPC/DPPD"), who independently reviewed Plaintiff's medical records, VA physician evaluation, pleadings, and prior testimony submitted by Plaintiff. *See* Def. App. at 2-3. AFBCMR concluded that "after a thorough review of [Plaintiff's] submission and his medical records, we are not persuaded by the evidence provided that he was improperly evaluated and that the information considered by the various medical boards was erroneous or inaccurate." *Id.* at 3-4.

The record evidences that all five separate tribunals that considered Plaintiff's fitness to continue to serve in the Air Force were supported by substantial evidence and their discretion properly was exercised pursuant to applicable federal statutes, Department of Defense regulations, and Air Force instructions. Therefore, the court has determined that the SAFPC's May 19, 1999 final decision and the AFBCMR's June 3, 2001 final decision not to revoke the

FPEB's recommendation to retire Plaintiff due to disability were supported by substantial evidence.

2. Other Statutory And/Or Regulatory Related Claims Alleged Do Not Evidence Error By The MEB, IPEB, FPEB, SAFPC, And/Or AFBCMR.

The Complaint also recited other statutory and/or regulatory related claims that require only brief comment. First, the Complaint seeks "bad faith" damages because the Air Force failed to allow Plaintiff to cross-examine the Psychiatric Resident. *See* Compl. ¶¶ 54-67 (Second Cause of Action). The FPEB President's denial of Plaintiff's request, however, was well within the Board's discretion as set forth in the Air Force Physical Evaluation for Retention, Retirement, and Separation Instruction AFI 36-3212. Section 3.48 therein provides: "HQ AFPC/DPPD will establish and provide to HQ AFPC/DFFDF the formal hearing format and procedures." Pl. App. at 133. Since the Air Force Personnel Command has not established any formal guidance concerning FPEB procedure, issues regarding what witnesses are competent to testify and the scope thereof have been left to the discretion of the FPEB President. *See Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (lacking any specific regulation "[t]he complex, subtle and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments."). Therefore, the Administrative Record does not support Plaintiff's allegations of bad faith. Moreover, Congress granted the Secretaries of the Armed Forces broad discretion to administer the military. Although the Air Force instructions do not specifically address the ability to cross-examine any witness, Plaintiff did not provide any evidence to overcome "the strong, but rebuttable,

presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith." *Saunders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979); see also 10 U.S.C. § 1216.[16]

Second, the Third Cause of Action alleged that the medical evidence presented during the entire disability evaluation process never overcame the "presumption of fitness," established by in AFI 36-3212 at § 3.17.[17] See Compl. ¶¶ 68-103. The Administrative record, however, evidenced that the "presumption of fitness" was overcome in this case by the diagnosis of several physicians that Plaintiff had a disability that precluded further service in the Air Force. *See* Def. App. at 65; *see also* Def. Supp. Ex. at 9-12. Therefore, as a matter of law, it is not relevant if Plaintiff may have been able to perform his duties for the twelve month period prior to his retirement, as a matter not contested in the Administrative Record.

The Fourth Cause of Action also alleged that 'due weight" was not afforded the VA physician's December 10, 1999 examination that rendered the AFBCMR decision unsupported by substantial evidence. As previously

3. The Complaint Fails To Allege A Violation Of Plaintiff's Constitutional Rights In This Case.

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[16] 10 U.S.C. § 1216 provides: "The Secretary [of the Air Force] has all powers, functions, and duties incident to the determination under this chapter of -(1) the fitness for active duty of any member of an armed force under his jurisdiction[.]"

[17] AFI 36-3212 at § 3.17 provides: "Presumption of Fitness. The PEBs will presume a member fit if he or she has been able to do his or her duty satisfactorily in the 12 months before a scheduled retirement.... The presumption of fitness may be overcome in the following circumstances: 3.17.1. Within the presumptive period an acute, grave illness or injury incurs that would prevent the member from performing further duty if he or she were not retiring[.]" Def. App. at 131.

discussed, the VA physician's December 10, 1999 evaluation was qualified and the record evidences that the evaluation was considered by the AFBCMR. *See* Def. App. at 2-3.

The First, Second, and Fifth Causes of Action allege violations of Plaintiff's constitutional rights. As discussed herein, none of these claims are applicable in this case.

a. The Confrontation Clause Of The Sixth Amendment To The United States Constitution Is Not Applicable In This Case.

The Confrontational Clause of the Sixth Amendment to the United States Constitution provides that in all criminal cases the accused shall enjoy the right to be confronted by adverse witnesses. *See Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) ("We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors...could appropriately draw inferences relating to the reliability of the witness.") In this case, to invoke the Confrontation Clause to compel the testimony of the Psychiatric Resident, Plaintiff would have had to be separated from the service with a "Dismissal" adjudged as a part of a federal criminal conviction from a General Court-Martial. *See* Manual for Courts-Martial, Rule 1003(b)(8)(A).[18]

Plaintiff cites *Greene v. McElroy*, 360 U.S. 474, 493(1959) and *Bland v. Connally*, 293 F.2d 852, 856-57

[18] Dismissal is the only type of punitive discharge applicable to military officers and is equivalent to either Dishonorable or Bad Conduct Discharge. *See* RCM 1003(b)(8)(B). A Bad-Conduct Discharge is punishment for conduct of either a civilian or military nature that does not rise to the level of a Dishonorable Discharge. *See* RCM 1003(b)(8)(C).

(D.C. Cir. 1961) to support his claim that the United States Constitution gives him a right to cross-examine the Psychiatric resident who wrote the January 13, 1999 Narrative Summary used during the disability retirement process. *See* Pl. Mot. Partial J. Admin. Rec. at 23-24 ("Plaintiff and the FPEB had 'no safeguard for testing by cross-examination' the statements of these absent witnesses to 'uncover inconsistencies, lapses in recollection, and bias[.]'"); see also Compl. ¶ 12. Plaintiff's argument, however, ignores a fundamental distinction between these cases and his own. In both cases, the individuals challenging the Department of defense and the Secretary of the Navy's administrative decisions were denied the opportunity to cross-examine unidentified accusers who provided direct oral testimony to the review boards. *See, e.g., Greene* 360 U.S. at 493 (holding that the Department of Defense's security clearance program, under which affected persons may lose their civilian jobs if they are found unfit to hold a clearance, violated the traditional procedural safeguards of confrontation and cross-examination); *Bland*, 293 F.2d at 856-57 (holding that the Secretary of the Navy did not have authority to issue a Other Than Honorable discharge to a reservist for alleged criminal conduct engaged in during inactive status, without permitting reservist to confront the Government's witnesses even in an administrative hearing). In this case, Plaintiff was retired with a medical disability. Therefore, the Confrontation Clause did not attach to proceedings before the MEB, IPEB, FPEB, FPEB, SAFPC, or AFBCMR – in this case the right to cross-examine the Psychiatric Resident regarding the January 13, 1999 Narrative Summary.

b. The Due Process Clause of the Fifth Amendment To The United States Constitution Was Not Violated In This Case.

In addition, the Complaint alleges that Plaintiff's counsel's inability to cross-examine the Psychiatric Resident during proceedings before the MEB, IPEB, FPEB, SAFPC, or AFBCMR also violated the Due Process Clause of the Fifth Amendment to the United States Constitution. *See, e.g.*, Compl. ¶¶ 1-2,6, 76, 105, 112, 116, 118, 137, 141. Plaintiff contends such cross-examination was essential since all of the Air Force's subsequent actions resulting in his retirement were rendered based on the FPEB's decision that Plaintiff was no longer fit for military service. *Id.* As previously explained, Plaintiff has no right in this case to compel the testimony or to cross-examine any witness. In light of the five tribunals that afforded Plaintiff a hearing, including the submission of pleadings and live testimony from Plaintiff, the court has determined that Plaintiff had "due process" in this case.

The Complaint also alleges that Plaintiff's disability retirement deprived him of the right to liberty under the Due Process Clause of the Fifth Amendment to the United States Constitution, because of the stigma associated with his retirement rises to the level of a punitive discharge. *See* Compl. ¶ 13.

Only a Dismissal, Dishonorable, Bad Conduct, or Other Than Honorable Discharge can qualify as types of military separations that limit Fifth Amendment liberty interests, because they may prevent a discharged person from qualifying for certain types of employment, receiving federal benefits, or voting in federal and state elections. *See* 38 U.S.C. § 5303; *see also* 10 U.S.C. § 1553; 42 U.S.C. § 1973gg-6(g)(1). In this case, Plaintiff's

[19] In cases of retirement for combat injury or service-incurred disability prior to reaching the statutory 20 year mark, service members are granted the same privileges as those who completed their required service. *See* 10 U.S.C. § 1201(b).

retirement, even for disability, signifies only the successful completion of twenty or more years of Honorable Service.[19] Therefore, the Air Force's decision to retire Plaintiff for disability did not deprive Plaintiff of a liberty interest in any future civilian employment or any other capacity. See TR at 32 ("I sincerely doubt these employees are seeing his DD Form 214 that says retired for mental disability. It probably just says retired with an honorable discharge and amended."

c. The Takings Clause Of The Fifth Amendment To The United States Constitution Is Not Applicable In This Case.

In addition, the Complaint alleges a violation of the Takings Clause of the Fifth Amendment to the United States Constitution. It is well settled that in order to bring such a claim under the Fifth Amendment,[20] a plaintiff must have a private property interest at the time of the alleged taking. As the United States Supreme Court restated in an unanimous opinion less than a week ago in *Lingle v. Chevron U.S.A., Inc.*, __ U.S. __, 125 S. Ct. 2074 (2005):

> The Takings Clause of the Fifth Amendment…'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.' In other words, it 'is designed not to limit the governmental interference with property rights *per se*, but

[20] The Fifth Amendment to the United States Constitution provides that no person shall be "deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend V, cl. 4.

> rather to secure *compensation* in the event of otherwise proper interference amounting to taking.'... The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.

Id. at 2080-81 (emphasis in original) (citations omitted); *see also Ciernega Gardens v. United States*, 331 F.3d 1319, 1328 (Fed. Cir. 2003) ("[T]he complaining party must show it owned a distinct property interest at the time it was allegedly taken[.]").

The Complaint alleges that 10 U.S.C. § 633 creates a vested property right affording Plaintiff the right to continue serving in the Air Force until he reaches 28 years of service. *See* Compl. ¶ 14. Plaintiff has misread this statute.[21] As a matter of law, it is well settled that employment as a military officer is not a vested property interest. *See Norman v. United States*, 392 F.2d 255, 259 (Ct. Cl. 1968) ("The principle is well established that there is no vested right to federal employment or to the privileges of retirement thereby."); *see also Paskert v. United States*, 20 Ct. Cl. 65, 77 (1990) ("[S]ervice members have no right to remain on active duty, and their rights are defined by the applicable statutes and regulations."). Title X only codifies the maximum years of service that a military officer must accrue prior to reaching mandatory retirement. *See* 10 U.S.C. § 630-636.

In this case, although the Air Force utilized Plaintiff's high

[21] 10 U.S.C. § 633 provides: "[E]ach officer of the Regular Army, Regular Air Force, or Regular Marine Corps who holds the regular grade of lieutenant colonel, and each officer of the Regular Navy who holds the regular grade of commander, who is not on a list of officers recommended for promotion to the regular grade of colonel or captain, respectively, shall, *if not earlier retired*, be retired on the first day of the month after the month in which he completes 28 years of active commissioned service." (emphasis added.)

year tenure date for administrative and retirement planning purposes, the Air Force was not obligated to allow Plaintiff to continue to serve until that date. In fact, 10 U.S.C. § 633 specifically states that it only applies if the service member has not been retired. Congress has authorized the military to retire members determined unfit to perform the duties of their office, grade, rank, or rating because of physical disability regardless of length of service. *See* 10 U.S.C. § 1201(a). Therefore, the Secretary of the Air Force had legal authority to retire Plaintiff due to his physical disability, based on the FPEB determination that Plaintiff was no longer fit to perform the duties of his office. *Id.*

CONCLUSION

For these reasons, the Government's May 28, 2004 Motion for Judgment Upon the Administrative Record is granted and the January 26, 2004 Complaint is dismissed.

IT IS SO ORDERED.

s/_____
Susan G. Braden
Judge

ADDENDUM:

After graduating from West Point, Plaintiff devoted his adult life in the service of our country. The stress of extended duty, particularly abroad, today is recognized as a major threat to the health of military service members. *See* Matthew J. Friedman, *Posttraumatic Stress Disorder: An Overview, A National Center for PTSD Fact Sheet, United State Department of Veterans Affairs* at http: www.ncptsd.va.gov facts general fs_overview.html. Plaintiff was not immune from the effects of that extended

stress And, as a result, he was retired involuntarily. *See What is Posttraumatic Stress Disorder, A National Center for PTSD Fact Sheet, United States Department of Veterans Affairs* at http://www.ncptsd.va.gov/facts/general/fs_what_is_Ptsd.html ("It is generally thought that the best way to diagnose PTSD-or any psychiatric disorder...is to combine findings from structured interviews and questionnaires with physiological assessments. A multi-method approach especially helps address concerns that some patients might be either denying or exaggerating their symptoms.").

The record in this case is clear that Plaintiff did not have the benefit of a multi-method approach" or drug therapy. Therefore, Plaintiff does not appreciate that even if he is absolutely correct that former President Clinton may have utilized strategy from Plaintiff's AWC research paper, without proper attribution, the means and manner in which Plaintiff chose to express that concern and his perception about those events adversely affected his continued ability to serve as an officer in the Air Force We now know that PTSD also often "is associated with the increased likelihood of co-occurring psychiatric disorders [and] [i]n a large-scale study, 88 percent of men...with PTSD met criteria for another psychiatric disorder." *Id.* at 3. The record in this case is also clear that the Air Force did not afford Plaintiff "a variety of forms of psycho-therapy and drug therapy [even though] some treatments appear quite promising." *Id.* at 4. Although the court has no authority to address that situation, if Plaintiff had been able to pursue those options, perhaps this case could have been avoided.

The court is confident that Plaintiff understands that he may now avail himself of this assistance through the VA. The circumstances surrounding Plaintiff's retirement may make this option akin to tearing a scab off an unhealed wound. Plaintiff, however, has exhibited intellect, courage, and tenacity in the past and in this proceeding. Therefore, the

court urges Plaintiff once again to call on those resources and reconsider allowing the VA professionals to conduct a thorough medical analysis of all the circumstances surrounding his retirement and help him work toward achieving much needed closure and renewal. Although the court does not have authority to afford Plaintiff a full measure of "justice," VA medical professionals are capable of doing so and should be given the opportunity. Plaintiff has a great deal of knowledge in the critical field of physics and talent that can be brought to bear in starting a new and even more productive chapter in his life. The court respectfully requests that Plaintiff undertake that initiative.[22]

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[22] Professor O'Reilly continues to be available to work with Plaintiff to achieve this objective. In the alternative, at the court's request, Ronald B. Adams, Joint Executive Director, National Veterans Legal Services Program, Washington, D.C., stands ready and willing to afford Plaintiff access to local resources to facilitate interface with VA medical and other professionals towards this objective. At the conclusion of the process, it may be possible for Plaintiff to reproach the AFBCMR, with counsel, to ascertain what options for reconsideration and correction may be available. Again, the court respectfully requests Plaintiff to work with VA professionals and outside counsel to explore that option at the appropriate time.

ORIGINAL

In the United States Court of Federal Claims

NO. 04-90 C FILED

JUN 26 2006

JOHN DOE,

U.S. COURT OF
FEDERAL CLAIMS

v.

JUDGMENT

THE UNITED STATES

Pursuant to the court's Order, filed June 26, 2006, vacating the judgment of June 30, 2005, and directing a new entry of judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

Brian Bishop
Clerk of Court

June 26, 2006 By: s/_____

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $455.00

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2006-5119

JOHN DOE,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

Before Mayer, Circuit Judge, Rader, Circuit Judge, and Prost, Circuit Judge.

A petition for rehearing having been filed by the Appellant,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on May 29, 2007.

FOR THE COURT

s/_____

Jan Horbaly

Clerk

Dated 05/01/2007

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
MAY - 1 2007

JAN HORBALY
CLERK

cc: John Doe
Gregory Thomas Jaeger

DOE V US, 2006-5119
(CFC-04-CV-90)

5 U.S.C. § 706

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall - (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

Rule 11 of the United States Court of Federal Claims

"Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, motion, and other paper shall be signed by or for the attorney of record in the signing attorney's own individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless the omission is corrected promptly after being called to the attention of the attorney or party.

(b) Representation to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions are warranted on the evidence or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonable based on a lack of information or belief."

NOTE: Subsections (c) "Sanctions" and (d) "Inapplicability to Discovery" have been omitted.